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February 16, 2017

Ms. Marlene H. Dortch, Secretary  
Federal Communications Commission  
445 Twelfth Street SW  
Washington, DC 20554

***Via Electronic Filing***

**Re: GN Docket No. 14-28, *Protecting and Promoting the Open Internet***

Dear Ms. Dortch:

Free Press writes to oppose the eleventh hour request submitted in this docket on February 3, 2017, by NCTA – The Internet & Television Association (“NCTA”) and USTelecom (the “NCTA/USTA Letter”).<sup>1</sup> That letter asks the Commission to expand the current so-called small provider enhanced transparency exemption to all broadband internet access service (“BIAS”) providers, no matter how large they may be in terms of subscriber count.

The NCTA/USTA Letter presents no sufficient justification for granting its last-minute request. But what it lacks in reason, it makes up for in audacity and hypocrisy. This letter is part of a years-long concerted effort by BIAS providers to profess unyielding adherence to the principles of transparency, all while working to undermine effective and sensible transparency rules such as those adopted in the various *Open Internet* orders.

The transparency rules first promulgated in 2010 and then enhanced in the *2015 Open Internet Order*<sup>2</sup> require broadband providers to disclose nothing more than the performance characteristics of the service they sell to their end-users; the providers’ network management practices; and their full slate of prices, promotional rates, fees, penalties, and usage limitations.<sup>3</sup> In the February 2015 order, the Commission gave “small” BIAS providers (defined as those with 100,000 or fewer broadband subscribers) a temporary exemption from these enhancements to the then-existing 2010 transparency rules.<sup>4</sup>

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<sup>1</sup> Letter to Marlene H. Dortch from NCTA – The Internet & Television Association and USTelecom, GN Docket No. 14-28 (filed Feb. 3, 2017) (“NCTA/USTA Letter”).

<sup>2</sup> *Protecting and Promoting the Open Internet*, GN Docket No. 14-28, Report and Order on Remand, Declaratory Ruling, and Order, 30 FCC Rcd 5601 (2015) (“*2015 Open Internet Order*”).

<sup>3</sup> *See id.* ¶¶ 163–171.

<sup>4</sup> *Id.* ¶ 173.

The Consumer and Governmental Affairs Bureau (“CGB”) sought comment in mid-2015 on extending the initial enhanced transparency exemption for small BIAS providers, and ultimately decided in December 2015 that it could not “fully evaluate the impact of removing the temporary exemption for smaller broadband Internet access service providers from the enhancements to the Open Internet transparency rule previously adopted by the Commission in the *2015 Open Internet Order*.”<sup>5</sup> The Bureau thus extended the temporary exemption for small providers to December 15, 2016.<sup>6</sup>

Prior to the grant of that first extension, Free Press opposed extending the exemption even for small providers, citing the lack of any credible evidence from small BIAS providers that “the burden of such enhanced transparency requirements outweighed the undisputed and profound benefits of enhanced transparency for broadband internet access users.”<sup>7</sup> We noted then that small providers had offered little more than contradictory and anecdotal estimates of the supposed burdens of the enhanced transparency requirements,<sup>8</sup> settling on an unsupported suggestion that these rules might require just two additional hours of work per month by providers subject to the rules. We also cited CTIA’s concession that “mobile broadband providers already disclose[d] much of the enhanced transparency information.”<sup>9</sup>

Finally, we explained that even if there were any substance to the small providers’ purported burdens (and there aren’t), the “benefits of the enhanced transparency requirements are substantial enough to outweigh vague and inconsistent claims about their potential cost.”<sup>10</sup> And as we stipulated at the time, the enhanced transparency exemption would disproportionately harm rural internet users to the extent that small providers were more likely to serve rural territories. As we have also explained on several occasions, the fixation on the important but relatively tiny percentage of small businesses that sell BIAS is curious to say the least, in light of the fact that the vast majority of small businesses in this country are buyers of internet access not sellers of it.

Prior to the extended expiration date of December 2016 for the temporary exemption set by CGB, several lobbying associations representing “small” BIAS providers filed an *ex parte* letter requesting an indefinite extension of the exemption for

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<sup>5</sup> *Protecting and Promoting the Open Internet*, GN Docket No. 14-28, Report and Order, 30 FCC Red 14162, ¶ 1 (2015).

<sup>6</sup> *Id.*

<sup>7</sup> Free Press Letter to Marlene H. Dortch, GN Docket No. 14-28 (filed Dec. 11, 2015).

<sup>8</sup> *See id.* at 1 (“In its initial comments, . . . the American Cable Association [ ] estimated that compliance would require an average expenditure of 16-24 hours annually. Not only is this perhaps the only specific estimate we found in the record – it flies in the face of WISPA’s assertion that at this time ‘it is impossible to develop accurate estimates.’”) (citations omitted).

<sup>9</sup> *Id.* at 2.

<sup>10</sup> *Id.* at 3.

their eligible members.<sup>11</sup> As the CCA *et al.* Letter noted, Congress was debating at the time legislation that would expand the exemption to even larger providers, up to those with 250,000 subscribers.<sup>12</sup>

We continue to maintain that a permanent exemption from these common-sense enhanced transparency safeguards is unwarranted, even for “small providers” under the limits set by the FCC orders and suggested by these bills. Yet whatever the supposed justification for the exemption granted to small providers, there is absolutely no reason to believe that the enhanced transparency rules unduly burden the country’s largest cable and telecom companies, with their tens of millions of broadband subscribers and their hundreds of billions of dollars in revenues.

The attempt earlier this month to join the bandwagon, coming as late as it did from NCTA and USTelecom, asks the Commission effectively to vitiate the enhanced transparency rules in their entirety. For this reason, regardless of what the Commission decides on the item in this docket slated for consideration at next week’s open meeting, we strongly oppose Commission expansion of the enhanced transparency waiver to companies with more than 100,000 customers. BIAS providers as a class still have provided no compelling record evidence that these rules place an unreasonable burden on them. They have not demonstrated that making additional and useful information about their services available to customers, as required by the enhanced transparency rules, would cause irreparable harm to their companies. And there is certainly no evidence that these rules have “diverted resources from efforts to ‘deploy faster and more sophisticated broadband networks’” as Chairman Pai falsely suggested a year ago – with absolutely no citation to any dollar figures or hour figures causing this alleged effect.<sup>13</sup>

NCTA and USTelecom are recycling old and invalid arguments about the supposed need to extend the enhanced transparency exemption to all BIAS providers. We are particularly incredulous that large providers are once again making these claims, some two years after the adoption of the enhanced transparency requirements and more than a full year after the separate comment cycle on them. Whatever the costs of compliance, they are dwarfed both by the public value of having these rules and by the yearly revenues of large BIAS providers. For example, Comcast’s broadband and business services surged in the fourth quarter of 2016, growing its cable business revenues by 7 percent and bringing them to \$12.8 billion for that quarter alone.<sup>14</sup> The Commission estimated in 2015 that compliance with the enhanced transparency rules would require 4.5 hours of work per year. These numbers are trivial compared to the resources that the large ISPs represented by NCTA and USTelecom command.

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<sup>11</sup> *Ex Parte* letter of the Competitive Carriers Association, Wireless Internet Service Providers Association, NTCA – The Rural Broadband Association, and the American Cable Association, GN Docket No. 14-28 (filed Dec. 13, 2016) (“CCA *et al.* Letter”).

<sup>12</sup> *See id.* at 2.

<sup>13</sup> NCTA/USTA Letter at 2.

<sup>14</sup> Shalini Ramachandran, “Comcast profit tops expectations, lifts dividend,” *Market Watch*, Jan. 26, 2017.

NCTA and USTelecom make one novel argument for extending the rules to large providers. After initially supporting an (unnecessary) exemption for small providers, these associations maintain that “granting only segment-specific stays while failing to provide relief across the industry would cause irreparable competitive harm to any BIAS providers that remain subject to the enhanced transparency requirements.”<sup>15</sup> This disingenuous and self-serving argument for uniformity undercuts the initial argument that small providers have a distinct regulatory burden, and militates equally in favor of extending the enhanced transparency rules to all BIAS providers. As the NCTA/USTA Letter recognizes, maintaining a competitive broadband marketplace is an essential function of the Commission. Maintaining users’ ability to make informed choices about their purchases is a necessary element of fulfilling that function.

Less than a year ago, a wide range of industry associations worked with the Commission to craft transparency guidelines that ostensibly benefited providers and internet users alike. At that time, the American Cable Association itself praised the collaboration by writing that with “the just-released Open Internet Transparency Rule Guidance on disclosing network performance metrics, FCC officials have properly balanced the interests of consumers and smaller Internet Service Providers (ISPs).”<sup>16</sup> Such metrics are among the enhanced disclosures under the *2015 Open Internet Order*,<sup>17</sup> and among those that BIAS providers have unjustifiably called an undue burden. Despite the shift in the election and the selection of a new chair, nothing regarding the shape of the market or reasonableness of such disclosures – even by small providers such as ACA’s members – has changed in the last few months. Rules that satisfied the demands of advocacy groups and the broadband industry then should not be overturned now.

People still deserve and demand the power to make informed decisions in the broadband marketplace. The rights of millions of customers to transparency must be given due consideration alongside amorphous and unsubstantiated claims made now by large providers. Free Press respectfully requests that the Commission not grant the request in the NCTA/USTA Letter seeking an exemption for all providers.

Sincerely,

/s/ Gaurav Laroia  
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<sup>15</sup> NCTA/USTA Letter at 2.

<sup>16</sup> “ACA Commends FCC On Open Internet Transparency Rule Guidance,” May 20, 2016 (“ACA had expressed concern that the enhanced network performance disclosure obligations adopted in 2015 were vague and would impose undue burdens on smaller ISPs. The new guidance addresses that concern by giving smaller ISPs additional and reasonable direction on complying[.]”) (emphasis added).

<sup>17</sup> *2015 Open Internet Order* ¶¶ 165–167.